GATX Logistics, Inc. *and* David Landstrom. Case 33–CA–11015

March 28, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 3, 1996, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, GATX Logistics, Inc., Normal, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer David Landstrom full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

"(b) Make David Landstrom whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision."

3. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall substitute a new notice that conforms with our Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with unspecified reprisals for wearing to work jackets containing a union insignia or logo.

WE WILL NOT discharge or otherwise discriminate against you because you may be engaged in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer David Landstrom full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Landstrom whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to David Landstrom's unlawful discharge and, within 3 days thereafter, WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

GATX LOGISTICS, INC.

Deborah Fisher, Esq., for the General Counsel.
James M. Walters, Esq. (Fisher & Phillips), for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried before me in Peoria, Illinois, on August 28, 1996. The charge in this matter was filed on December 21, 1994, by David Landstrom and, pursuant thereto, a complaint was issued by the Regional Director for Region 33 of the National Labor Relations Board (the Board) on March 3, 1995, alleging that GATX Logistics, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening Landstrom with unspecified reprisal because he wore a jacket containing the logo of International Association of Machinists, AFL–CIO (the Union) to work, and also violated Section 8(a)(3) and (1) by thereafter discharging him because it believed he supported or lent assistance to International Association of Machinists, AFL–CIO, and to discourage employees from engaging in such activities. The

Respondent thereafter filed an answer denying the commission of any unfair labor practices.

The parties were afforded a full opportunity at the hearing to be heard, to call, examine and cross-examine witnesses, to introduce relevant evidence, and to argue orally on the record. On the basis of the entire record in this proceeding, including my observation of the witnesses, and having fully considered the posthearing briefs filed by the General Counsel and the Respondent,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Florida corporation, with an office and place of business in Jacksonville, Florida, maintains a warehouse facility in Normal, Illinois, the situs of the alleged unlawful conduct, from which it provides various warehousing services. During the past calendar year the Respondent, in the course and conduct of its above-business operations, provided services valued in excess of $50,000 for Mitsubishi Motors (formerly known as Diamond Star Motors), an enterprise located in the State of Illinois which is directly engaged in interstate commerce. The Respondent admits, and I find, that at all times material here, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is further admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

Landstrom was employed by the Respondent as a full-time regular employee from October 3 to November 22, 1994.[2] Since early July, prior to obtaining regular employment with Respondent, Landstrom was employed as a contract driver by Riddle & Riddle Trucking, and in that capacity was assigned to perform trucking services for the Respondent. While in Riddle & Riddle's employ, Landstrom was primarily responsible for delivering "hot parts" from the Respondent's facility to Mitsubishi Motors, and while performing such duties for Respondent was supervised by Mike Reindl, who at the time served as general manager of the Respondent's "contract carriers" division.[3] Landstrom credibly and without contradiction testified that sometime in early September, Reindl told him and another contract employee, Steve Smith, that they were doing a great job and that he intended to take them on as full-time employees for the Respondent so that they could take advantage of Respondent's fringe benefits. In fact, Landstrom, as noted, was hired by Respondent as a second-shift employee in its "Flow Through" department on October 3,[4] where he continued to perform essentially the same functions he had been doing while employed by Riddle & Riddle.[5] Although the need to have the "hot parts" delivered immediately to Mitsubishi rendered the position a "critical" one, as claimed by the Respondent, there is no evidence to suggest that a "hot parts" driver was expected to have any special training or skills, other than the appropriate commercial driver's license required of Respondent's other truckdrivers, or that such duties could not have been performed by any other of Respondent's properly licensed drivers. When hired, Landstrom underwent orientation from Diane True of the human resources department, during which he viewed a 10–15-minute video, and received some insurance papers and information on a 401(k) retirement savings plan. It is undisputed that Landstrom never received an employee handbook or a copy of the Company's rules of conduct or disciplinary procedures. Landstrom testified he was never told either during orientation or at any point thereafter that he was deemed to be a probationary employee for the first 90 days of his employment, and credibly testified, without contradiction, that he was never told he could not use the company phones to make personal calls, or that there were any restrictions whatsoever on the use of these phones. The Respondent concedes it did not provide Landstrom with an employee handbook, and further admits it does not have an express prohibition on employee use of company phones for long-distance personal calls (R. Br. 14–15).

As a GATX employee, Landstrom received $1.50 more per hour over what he had been earning as a contract driver for Riddle & Riddle. Landstrom testified, without contradiction, that prior to being hired by Respondent, Reindl told him and Smith that they could expect to be hired sometime in mid-September, but that soon after he began working for Respondent on October 2, Respondent's warehouse general manager, Kevin Jones, approached him, apologized for not being able to hire them sooner, and stated he would try to get them retroactive pay, e.g., the $1.50 per hour increase, retroactive to the date they would have been hired in mid-September. Jones told Landstrom that if the retroactive pay did not show up in his paycheck, he should give him "a holler." When his retroactive pay did not appear in his paycheck as promised by Jones, Landstrom inquired of Respondent's general manager, John Nabakowski, whether he would be receiving the retroactive pay, but the latter simply replied that he knew nothing about it, that he was not in charge of such matters, and it was not "his deal." Landstrom claims this was the only conversation he had with Nabakowski over the matter, and that it was nonconfrontational in nature.

Nabakowski testified he had two separate and very different conversations with Landstrom regarding the retroactive pay and other matters. Thus, he claims that Landstrom had approached him and insisted that his start date be pushed back because he did not want to be "screwed out of holiday pay." Nabakowski asserted, without explaining how he knew, that Landstrom was not referring to the Thanksgiving holiday, but must have been referring to either the Christmas or New Year's holiday. Nabakowski claims that he then checked with Reindl to find out what had been said to Landstrom about retroactive pay, and whether any promises had been made to him. Reindl purportedly informed him that

[1] The Respondent's unopposed motion to correct various nonsubstantive inaccuracies in the record is granted.

[2] All dates are in 1994, unless otherwise indicated.

[3] "Hot parts" items had to be delivered to Mitsubishi Motors on an emergency basis to avoid the latter having to shut down its assembly line.

[4] The "Flow Through" department is located about one-half mile from the "contract carriers" facility.

[5] When not running "hot parts" to Mitsubishi Motors, Landstrom performed other chores such as operating a forklift, loading trucks, and helping with computer generated billings.

he and Landstrom had discussed the matter, and then told Nabakowski nothing could be done, that there had been a "snafu" at headquarters, and that his hands were tied. Nabakowski claims he went back to Landstrom and told him, "Sorry, there is nothing that can be done," mentioning further that he was in any event currently better off because he was making more money than he had been earning with Riddle & Riddle. A few days later, Nabakowski purportedly saw a "Change of Status" form approving retroactive pay for Landstrom on True's desk. He then asked Jones, who was with him in True's office at the time, about the form and was told by Jones that he had approved the retroactive backpay. Nabakowski claims he became "extremely upset" on hearing this because he, not Jones, was Landstrom's supervisor, and came to believe that Landstrom had gone behind his back despite being told he would not be getting retroactive pay. Nabakowski purportedly rescinded Jones' approval of the retroactive pay, and went directly to Landstrom and told him, "David, this is bull shit; it is a dead issue. I don't appreciate you going behind my back. This can't be tolerated. You know, I don't like what I am seeing now. I am seeing some changes that aren't positive." In response to a leading question from Respondent's counsel, Nabakowski claims he further mentioned to Landstrom that he was upset, and that "[i]f this continues, we won't make it through the probationary period." Despite his ability to recall the details of his meeting with Jones and what he said to Landstrom, inexplicably Nabakowski had no recollection of whatsoever of Landstrom may have said in response to his above remarks.

On November 19, Landstrom reported for work at 4 p.m., the start of his shift, wearing a union jacket that bore his name, and contained the logo of International Association of Machinists Local 852, from Clinton, Illinois, on the front, and the same but much larger logo on the back (see G.C. Exhs. 3[a-c]). Soon thereafter, Landstrom had a conversation with Nelson "Hodgie" Teichmann, who at the time supervised the "Flow Through" operations. According to Landstrom, employees Tom Jordan, Richard Schlosser, Steve Smith, and Cliff Gillespie were present during this conversation. Landstrom testified that on seeing his union jacket, Teichmann stared at the union logo and commented, "That won't go over too well here," referring to the Union. Landstrom claims he brushed aside Teichmann's remark, and then handed Jordan a union bumper sticker that read, "Union, Yes." Jordan laughed and returned the sticker to Landstrom.[6] Gillespie, according to Landstrom, took the sticker offered to him by Landstrom, stating that "it might come in handy at a later time." After some small chat with Smith, Landstrom turned to go to his locker, at which time Teichmann remarked, "That's an awfully big target you have on your back," referring to the larger union logo on the back of Landstrom's jacket.

Teichmann did not dispute having seen Landstrom wearing the union jacket on the day in question, but provided a different version of the encounter. He testified, for example, that on seeing Landstrom's jacket, he was unable to recognize the union logo, and simply asked Landstrom out of curiosity what the letters on the logo meant, and that Landstrom replied he obtained the union jacket while working for a prior employer, and that he wore it simply to "piss Jordan off," a statement Landstrom denies making.[7] Teichmann claims nothing else was said and that the conversation ended at that point. When asked whether at the time of his conversation he knew that it was a union jacket, Teichmann replied somewhat ambiguously, "Not really." Teichmann testified to having some familiarity with unions but that his curiosity about Landstrom's jacket was aroused because he had never before seen this particular logo, and that had it been a symbol of some other labor organization, such as the United Auto Workers, he might have recognized it. Teichmann expressly denied making the "big target" remark attributed to him by Landstrom, and gratuitously added that this was the type of comment employee Jordan would have made. His latter testimony regarding Jordan is somewhat confusing given his additional testimony that no one that he knew of was present at the meeting.

Teichmann also described a conversation he had with employee Schlosser at around the same time, but could not recall if it occurred before or after his discussion with Landstrom. Teichmann claims he met with Schlosser to tell him he was doing a good job and was proud of him, and that Schlosser would soon be hired by Respondent.[8] During that conversation Landstrom, according to Teichmann, walked by. Teichmann claims he said something to Landstrom as he passed by and that Landstrom responded with a "smart remark of some sort" which angered him, causing him to remark to Schlosser that "[w]ith that kind of attitude, we're going to have to do something about it," clearly referring to Landstrom. Teichmann could not recall what he said to Landstrom as he passed by, or what Landstrom said in return that caused him to become so angry, and did not recall if Landstrom was wearing his union jacket when this exchange occurred.

Schlosser, who was still employed by Respondent at the time of the hearing, was subpoenaed to testify by the General Counsel. He testified to having been present during some, but not all, of the Landstrom/Teichmann conversation, and recalled, contrary to Teichmann and in agreement with Landstrom, that employees Jordan and Gillespie were present during their encounter. He further recalled having had a discussion with Teichmann some 5 minutes after the Landstrom/Teichmann encounter. His recollection of the Landstrom/Teichmann discussion corroborates in large measure Landstrom's version of the event. Thus, he recalled that Landstrom had union bumper stickers with him, joked about putting one on Jordan's car, and offered one to Gillespie. He further recalled telling Landstrom he did not want one put on the back of his car. As to his own discussion with Teichmann some 5 minutes later, Schlosser claims that Jordan was also present during this conversation, and that Teichmann told Schlosser he would be hired full time by the end of the year. During this conversation, Schlosser observed that Teichmann seemed very angry or upset and when he inquired about his mood Teichmann engaged him in a conversation about Landstrom's jacket and the union bumper

[6] Landstrom testified he offered Jordan the bumper sticker because 1 week earlier the latter jokingly harassed him about the union bumper sticker Landstrom had on his own car.

[7] Teichmann claims he was directly quoting Landstrom.

[8] Schlosser had been working with Manpower, a temporary employment firm.

stickers, and angrily commented to Schlosser that there "was no damn way there was going to be Union there, and that he would see to that." Schlosser testified that following his discussion with Teichmann he went over to Landstrom and advised him to "knock it off" because Teichmann was upset with Landstrom presumably because of his overt prounion behavior. Schlosser further confirmed through his testimony Landstrom's assertion that employees were never told they could not use company phones to make personal long-distance calls, and that the access code for making such calls was kept in a folder at a desk frequently used by numerous employees.

On November 22, shortly after reporting for work, Landstrom was told that Nabakowski wanted to speak with him. Landstrom proceeded to Nabakowski's office where the latter and Teichmann were waiting. Landstrom testified, without contradiction, that after asking Landstrom to be seated, Nabakowski informed him his services were no longer needed and he was being let go. When Landstrom asked for an explanation, Nabakowski initially told him he did not have to give Landstrom a reason. Landstrom protested that as he had worked for Respondent since July (first as a contract driver, then as an employee), he should be provided with an explanation as to why he was being let go. Nabakowski repeated that he did not have to give Landstrom an explanation, but a short while later relented and stated he was being discharged for having made excessive long-distance phone calls to his home totaling more than $20. Landstrom did not dispute this fact, and offered to reimburse Respondent for the calls. Landstrom claims that Nabakowski told him the decision was made by Respondent's warehouse general manager, Mike Millet, that Landstrom should talk to Millet about it, and that if "he (Nabakowski) had been handling it, things would have been done differently."

Nabakowski provided virtually no testimony regarding the substance of the November 22 meeting. His only testimony regarding the meeting was that he did not recall Landstrom offering to pay for the phone calls, and claimed he was unable to recall anything else because of the 2-year passage of time since the meeting. Teichmann, who was also present at the meeting, was not questioned about what he, Nabakowski, or Landstrom may have said. Given these facts, I credit Landstrom's version of what transpired at the meeting, including his testimony that Nabakowski disclaimed any responsibility for discharging him and instead placed that decision squarely on Millet. In its posthearing brief, the Respondent asserts that Nabakowski made the decision himself after consulting with Millet and Reindl, and the record does indeed reflect some testimony from Nabakowski in this regard. However, Nabakowski's testimony as to who was responsible for the discharge decision was not as clear as the Respondent would have one believe, but was instead rather vague and confusing. Thus, when asked by the General Counsel "who made the decision to terminate Landstrom," Nabakowski responded, "it was a coop effort" involving Millet, Reindl, and himself (Tr. 27), and when the same question was asked by me, he replied that the decision was made by "myself, Mike Reindl, and Mike Millet" (Tr. 33). However, in response to a leading question from Respondent's counsel during the latter's presentation of its case-in-chief, Nabakowski stated he made the decision to terminate Landstrom (Tr. 134), and that he simply informed Millet and Reindl of his decision in order to cover all bases (Tr. 139–140, 150, 152). Nabakowski's own ambiguous and less than credible testimony as to who was responsible for the discharge decision, and his failure to specifically refute Landstrom's testimony as to what Nabakowski said to him during the meeting,[9] convinces me that Landstrom's account of the November 22 discharge meeting is accurate. I therefore find that while Nabakowski knew that Landstrom was to be discharged on November 22, that decision was made by Millet, and that Nabakowski, who told Landstrom he would have done things differently if the decision was his to make, simply served as the management official charged with implementing the decision.

Landstrom testified, again without contradiction, that he spoke with Millet 1-week later by phone, as Nabakowski urged him to do at the November 22, meeting, and that on asking why he had been let go, Millet told him he was a probationary employee and, as such, the Respondent did not have to give him a reason for the discharge. Millet nevertheless told Landstrom he had been fired because of the phone calls, because of his "attitude," and because of his complaints about not getting his paycheck on time,[10] and not getting retroactive pay. Landstrom then asked Millet why, if there was a problem with his attitude or, indeed, his work performance, the matter had not been brought to his attention or discussed with him, and Millet responded that "they did not have to talk to [him] about anything; that they had 90 days in which to make up their mind whether they wanted to keep [him] or not." Landstrom suggested that Millet speak with his former employers, including Diamond Star, about his credentials in the hope of convincing Millet to take him back. Millet agreed to do so and promised to get back to Landstrom in a couple of days. When Millet failed to call him back, Landstrom phoned Millet who told him he had

[9] Nabakowski, it should be noted, testified twice at the hearing, first as an adverse witness for the General Counsel, at which time he was cross-examined extensively by the Respondent, and again as a witness for the Respondent, after Landstrom had testified. Respondent thus had ample opportunity to elicit from Nabakowski a detailed account of what occurred at the November 22 meeting, as well as a denial of the statements attributed to him by Landstrom. Further, Teichmann, who also followed Landstrom on the witness stand, was likewise not asked to refute Landstrom's claim that he was present at his discharge meeting, or Landstrom's narration of what occurred or was said therein. Nor, indeed, did Respondent bother to call Millet as a witness to confirm or deny that he was responsible for Landstrom's discharge, as Landstrom claims was stated to him by Nabakowski at the meeting. Accordingly, Respondent's failure to elicit testimony from Nabakowski and Teichmann on what was said at the November 22 meeting, or to have them deny Landstrom's account of the meeting, and its failure to call Millet as a witness in the matter, warrants drawing of an adverse inference against Respondent. *United Parcel Service of Ohio*, 321 NLRB 300 fn. 1 (1996); *Asarco, Inc.*, 316 NLRB 636, 640 (1995).

[10] Landstrom testified that he had spoken to Teichmann once regarding the fact that he had been receiving his paycheck on Thursday, rather than on Wednesday night, as was customary for drivers, and that Teichmann assured him they would be available Wednesday night. Although on cross-examination Landstrom testified he "had a conversation with Mr. Nabakowski concerning the paycheck, and another conversation concerning . . . retro pay," it is not clear if Landstrom's reference to a paycheck conversation pertained to his complaint about the Wednesday night delivery of his paycheck.

made his inquiries and that the decision to terminate him would stand.

Landstrom thereafter wrote to Respondent's president, Joe Nicosia, to explain why he felt he was unjustifiably discharged, and asking to be reinstated (G.C. Exh. 4).[11] On or about December 23, Landstrom received a letter from Respondent's director of human resources, Robert Alman, in response to the letter Landstrom had written to Nicosia. Alman states in his letter that he had reviewed Landstrom's situation and learned that Landstrom had been "terminated during the probationary period of your employment for violating company policy (specifically, for using the telephone access code without permission and having your personal phone calls billed to GATX) not on account of any bumper sticker." Alman's letter expresses Respondent's appreciation for Landstrom's offer to reimburse the Company for the long-distance calls, but states that it was "GATX's policy that any significant violation of company policy during the probationary period will lead to the termination of employment" and, consequently, his discharge would stand (G.C. Exh. 5).

B. *Discussion and Findings*

1. The 8(a)(1) allegation

There is no question that Landstrom was engaged in protected activity within the meaning of Section 7 of the Act when he wore his union jacket to work, for it is well settled that absent special circumstances, not alleged to be present here, employees have a protected right to wear union insignia to work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Albertson's, Inc.*, 319 NLRB 93, 102 (1995); *DeMuth Electric, Inc.*, 316 NLRB 935 (1995). *Escanaba Paper Co.*, 314 NLRB 732 (1994); *Control Services*, 305 NLRB 435, 441 (1991). The question remains, however, whether Teichmann threatened Landstrom with unspecified reprisal for engaging in such conduct. The answer to this question depends on which version of the November 19 encounter between the two is the more credible—Landstrom's or Teichmann's. In making this determination, I consider first the reliability of Schlosser's testimony, as the weight to be given to his testimony inevitably impacts on Landstrom's and Teichmann's credibility.

I was much impressed by Schlosser's demeanor on the witness stand and am convinced that he testified in an honest and straightforward manner.[12] Accordingly, I credit his account of his meeting with Teichmann, which for the most part was undisputed, and his testimony as to what he recalled about the Landstrom/Teichmann encounter, which in large measure corroborates Landstrom's version of that meeting.[13] Thus, unlike Teichmann, who claimed he could not recall who was present during his encounter with Landstrom (although he initially claimed no one else that "he knew of" was present), Schlosser and Landstrom agree that employees Jordan and Gillespie were also present. Further, unlike Teichmann, who claims that after his initial inquiry about the union logo on the jacket nothing else was said, Schlosser and Landstrom both testified that Landstrom engaged in some discussion with Jordan about placing a union bumper sticker on the latter's car. Nor were these the only lapses in memory experienced by Teichmann regarding his November 19 discussions with Landstrom and Schlosser. He could not, for example, recall if his conversation with Landstrom occurred before or after his meeting with Schlosser, nor could he recall what he said to Landstrom, or what the latter said in return, that caused him to become so angry and led him to comment to Schlosser that something would have to be done about Landstrom's "attitude." Ironically, his poor memory regarding the above matters contrasts sharply with his rather keen ability to recall verbatim what Landstrom allegedly said was his reason for wearing the union jacket, e.g., to "piss Jordan off." Overall, Teichmann was an unimpressive witness who seemed to be testifying in a less than candid fashion. Accordingly, I do not credit him and instead credit Landstrom's account of what Teichmann said to him on November 19. Thus, I find that on seeing Landstrom wearing his union jacket, Teichmann warned him, "That won't go over too well here" and on noticing the large Union logo on the back of the jacket further commented, "That's an awfully big target you have on your back." Although Teichmann did not expressly tell Landstrom to remove his jacket, his remarks could reasonably have led Landstrom to believe that Respondent did not approve of him wearing the union jacket, and that there might be repercussions or some unspecified reprisal if he continued to do so. *DeMuth Electric*, supra. Accordingly, I find that by his comments Teichmann implicitly threatened Landstrom with unspecified reprisals, and thereby violated Section 8(a)(1) of the Act.

2. The 8(a)(3) allegation

The General Counsel contends that Landstrom's November 22 discharge was discriminatorily motivated and that Respondent simply used the long-distance calls as a pretext to rid itself of what it viewed as a potential union agitator. The analytical framework for determining when a discharge violates Section 8(a)(3) and (1) of the Act is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the burden of proof rests initially with the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to terminate Landstrom. To establish a prima facie case, the General Counsel must show the existence of protected activity, the employer's knowledge of that activity, and evidence of union animus. If the General Counsel is able to make such a showing, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. An employer does not satisfy its burden in this regard by simply

[11] In the letter, Landstrom mentions the incident wherein he gave Jordan a union bumper sticker in Teichmann's presence, and relates how he was told by an unnamed employee that Teichmann had commented he intended to make sure there would be no union at the "Flow-Through" department.

[12] Schlosser's overall credibility is further enhanced by the fact that he provided testimony adverse to Respondent's interest while still in its employ. *Sam's Club*, 322 NLRB 8 (1996). *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992).

[13] Although Schlosser testified he did not hear Teichmann make the comments which Landstrom attributes to him, he admits he was not present for the entire conversation between the two. Thus, Schlosser's failure to hear the alleged comments does not mean they were not made by Teichmann, for such comments, were in all likelihood made before Schlosser joined in the conversation.

stating a legitimate reason for the action taken, but must instead persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of any protected activity. *T & J Trucking Co.*, 316 NLRB 771 (1995).

The Respondent does not deny that Landstrom engaged in protected activity on November 19, and that Teichmann had knowledge of such activity. It contends, however, that Teichmann's knowledge cannot be imputed to those responsible for discharging Landstrom, citing Teichmann's testimony that he did not inform Nabakowski or any other management official of his encounter with Landstrom, and quoting from the Board's decision in *United Cloth Co.*, 278 NLRB 583 (1986), which it claims stands for the proposition that a supervisor's knowledge of an employee's union activity cannot be imputed to other members of management where the supervisor plays no role in the discharge decision.

Initially, the Respondent's reliance on *United Cloth*, supra, is misplaced and based on an incorrect reading of the Board's holding in that case. Thus, the Respondent in its posthearing brief (at p. 5) quotes the judge in *United Cloth* as stating that "even if [the supervisor] had knowledge of [the employee's] union activities it could not have been imputed to other members of management since [the supervisor] played no role in the decision to discharge." However, what the Respondent failed to mention is that the judge was not making a finding in this regard but rather was simply restating the argument posed to him by the employer in that case. Had the Respondent taken the time to read *United Cloth* with greater care, it would have learned that the judge rejected the employer's above argument, and reached a result contrary to that which the Respondent proffers here.[14] Thus, even if I were to believe Teichmann's claim that he did not inform other management officials of his encounter with Landstrom, the Board's holding in *United Cloth*, contrary to Respondent's assertion, allows Teichmann's knowledge of Landstrom's protected activity to be imputed to those management officials involved in Landstrom's discharge, including Millet who, as noted, was responsible for the decision. Significantly, Teichmann, like the supervisor in *United Cloth*, was also present when Landstrom's discharge was effectuated, a factor which the judge in that case seems to have relied to support his finding that the supervisor's knowledge should be imputed to those involved in the discharge decision. See *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986). In any event, given Teichmann's overall lack of credibility as a witness, and his comments to Schlosser about fixing Landstrom's "attitude" problem and how he would see to it that the Union was not brought in, I am convinced that Teichmann did indeed inform Nabakowski, and in all likelihood Millet, of what occurred between him and Landstrom on November 19, and of having seen the latter wearing a union jacket and giving out bumper stickers to other employees. Finally, Teichmann's threat to Landstrom, and his comments to Schlosser about fixing Landstrom's "attitude" problem and making sure the Union did not come in, all provide sufficient evidence of Respondent's antiunion animus.[15] In light of the above, and given the suspect timing of the discharge, just 3 days after the November 19 encounter with Teichmann, I find that the General Counsel has made a strong prima facie showing that Landstrom's discharge was motivated, at least in part, by his protected activity, and by a belief that Landstrom may have been the point man in a union effort to organize the "Flow Through" department employees. As the General Counsel has established a prima facie case, the burden shifts to the Respondent to show it would have discharged Landstrom even if he had not engaged in any protected activity. The Respondent has not, in my view, met its burden in this case.

The Respondent offers what I find to be two inconsistent and pretextual reasons for Landstrom's discharge. First, it argues that Landstrom was discharged because he violated "Company rules" prohibiting employees from making "unauthorized long distance calls (R. Br. 14–15). However, it failed to produce any evidence to show that it had any written rule or policy which prohibited employees from using company phones to make personal long distance calls, or for that matter, local calls. In fact, it readily concedes that its employee handbook, which presumably serves as an employee guide to company rules, policies, and regulations, "does not specifically address the use of company phones for personal long distance calls,"[16] and has not asserted that such policy can be found in some other company document or manual. The only hard evidence produced by Respondent relative to the above contention is a "Change of Status" form that was prepared on Landstrom following his discharge (R. Exh. 4). Respondent's Exhibit 4, however, offers no support for the Respondent's position, for other than reflecting that Landstrom's discharge fell within a code "402" category, broadly defined as a "Violation of Rules/Policies/Procedures," the "Change of Status" form does not identify what particular rule or policy Landstrom is alleged to have violated, and clearly makes no reference to any restrictions whatsoever on employee use of its phones. While I do not quarrel with the general proposition that an employer may legitimately discipline an employee for misuse of company property, to satisfy its *Wright Line* burden of proof, "there must be evidence that a theoretically possible reason for a particular action was in fact the reason; the assertion by itself does not suffice as proof." *Caguas Asphalt*, 296 NLRB 785, 786 (1989). Here, the Respondent's bare assertion of such a policy without proof of its existence

[14] Thus, addressing itself to the employer's argument, the judge, inter alia, stated in *United Cloth*, supra at 591 fn. 6: "I reject Respondent's argument that [the supervisor's] knowledge of [the employee's] union activity may not be imputed to Respondent because she had no part in the discharge decision. The facts clearly show that [the supervisor] was a witness to the discharge."

[15] While Teichmann's comments to Schlosser are not alleged as violations of the Act, they nevertheless help to shed light on Respondent's overall motivation. See *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993).

[16] When asked if at the time of Landstrom's discharge Respondent had any rules governing the use of its phones, Nabakowski testified somewhat evasively that the employee handbook had a policy concerning "basically abuse of Company policies or properties." The Respondent, however, did not produce the handbook and, consequently, Nabakowski's above testimony lacks corroboration and, like his other testimony, is not worthy of belief. In any event, even if the employee handbook contained such a rule, and assuming further that Respondent broadly construed such a rule as a prohibition on employee use of its phones, it would not have helped the Respondent's defense much as Respondent readily admits Landstrom was never given a copy of the handbook and, accordingly, could not have known of any such rule.

will not suffice to satisfy the Respondent's *Wright Line* burden of proof. See *Cincinnati Truck Center*, 315 NLRB 554, 556 (1994); *Great Western Produce*, 299 NLRB 1004, 1007 (1990).[17]

The Respondent in any event would not prevail even if it had demonstrated the existence of such a rule or policy, for the uncontroverted and credible evidence of record establishes that employees were never made aware of any such restriction and that the use of company phones to make personal long-distance calls was a common practice among employees for which no discipline, much less discharge, was ever meted out. Thus, Landstrom credibly testified that he was never told of any such restriction, that he had been making personal long distance calls from company phones since he began working as a leased driver in early July without ever being told not to do so, that on at least one occasion Teichmann saw him make such a call and did not object,[18] and that during July, August, and possibly September, he personally observed and overheard other employees (Buss, Gillespie, and two brothers he knew only as Wes and Les) make personal long-distance calls. Landstrom's claim that he was never notified of any such rule is corroborated by Schlosser who testified that he too had never been told of such a policy, and was first made aware of such a prohibition several weeks after Landstrom's discharge when Respondent posted at its warehouse facility a notice regarding employee use of its phones. The Respondent did not contest either Landstrom's or Schlosser's above testimony.[19] Nor did it present any credible evidence to show that other employees had been similarly discharged or otherwise disciplined for making personal long-distance calls.[20] The above facts, and more particularly the Respondent's failure to establish that it had such a rule or policy, that such a rule, if it did exist, was never communicated to employees and was largely ignored by Respondent, and that no credible showing was made that other employees had been disciplined for similar conduct, supports a finding that the excessive phone calls made by Landstrom during the month of September was the not true reason for his discharge, but were instead used as a mere pretext by Respondent to disguise the true motive for its actions, e.g., Landstrom's November 19 protected activity. *Wellstream Corp.*, 313 NLRB 698, 709 (1994); *Thill, Inc.*, 298 NLRB 669, 670 (1990); *Taylor Chair Co.*, 292 NLRB 658, 667 (1989).[21]

[17] Although it has made no such claim here, any suggestion by the Respondent that it was referring to code "402" when it stated in its brief that Landstrom's discharge resulted from a "rules violation," is without merit, for it is patently clear that code "402" is not a rule per se but rather a "catch-all" type of provision which the Respondent apparently uses to reflect a violation of a specific rule, policy, or procedure. In fact, implicit in the wording of the "402" category is the recognition that the Respondent has specific written rules, policies, and procedures which it expects employees to abide by, and that employees are somehow made aware of these rules and policies during their employment tenure. As the Respondent has not established that it has any such written rule regarding the use of its phones, it leaves unexplained the code "402" entry on R. Exh. 4. As the Respondent does not suggest that there was some other reason for his discharge unrelated to his phone use which might explain the code "402" entry on his "Change of Status" form, I find it reasonable to infer that the Respondent used this rather broad "catch all" provision to mask its true reason for the discharge, e.g., Landstrom's protected activity.

[18] In fact, according to Landstrom, Teichmann was a participant in this phone conversation with his wife which involved a discussion on the purchase of a personal computer. As Teichmann was not questioned about or asked to refute Landstrom's assertion, Landstrom's claim that Teichmann did not object to his use of the phone to make the long distance call and to his involvement in the call is accepted as true.

[19] Seeking to cast doubt on Landstrom's testimony, the Respondent during cross-examination asked Landstrom to identify on R. Exhs. 1 and 2 the calls placed by these individuals. Although Landstrom was unable to do so, I find credible his explanation that he was only able to identify the Weldon numbers on R. Exhs. 1 and 2 he was familiar with. His lack of familiarity as to which phone number belonged to the individuals in question does not mean he could not have observed them using Respondent's access code to make the calls or that he could not discern whether the conversations engaged in by the individuals was personal in nature. In any event, any doubt the Respondent may have had as to whether the remaining calls listed on R. Exhs. 1 and 2, were made by the above individuals or whether they were personal or business related could have easily been assuaged by comparing the phone numbers on the billing statements with those found in employee personnel files, as it presumably did in Landstrom's case. Respondent chose not to do so, leaving intact Landstrom's assertion that such calls were routinely made by other employees. In any event, Landstrom's testimony is that the phone calls which he observed the above employees make occurred for the most part in July and August. R. Exhs. 1 and 2, however, only reflect phone calls made from mid-September through mid-November. Again, the Respondent could have reviewed the July and August phone bills to ascertain the truth of Landstrom's assertions but did not do so, leaving Landstrom's testimony unrefuted.

[20] In an effort to show that Landstrom's discharge was consistent with past practice, the Respondent produced a "Change of Status" form on one employee, Dan Sombeck, which purports to show that he was discharged for the identical violation of making unauthorized long distance calls (R. Exh. 5). R. Exh. 5, however, contains a correction which, along with a Company document introduced into evidence by the General Counsel as G.C. Exh. 9, reflecting an inconsistency in the stated reason for Sombeck's departure from employment, causes me to doubt the authencity of R. Exh. 5 and, if anything, suggests that it might have been "doctored" after the fact to support Respondent's above contention. Thus, R. Exh. 5 reflects that Respondent initially listed Sombeck's separation from employment under a "305" code, which the form identifies as a voluntary separation for personal nonjob related reasons. However, at some point thereafter, a code "402" was written over the "305" entry, and the words "Long distance phone calls on Company Time & Money" were inserted in the form's "comments" section. This entry, however, conflicts with the entry on G.C. Exh. 9 which clearly indicates that Sombeck voluntarily resigned his position, and was not terminated. In fact, the reason stated on G.C. Exh. 9 is fully consistent with the code "305" entry that was initially placed but crossed out on R. Exh. 5. The Respondent provided no explanation for this glaring inconsistency. While it had Lori Ragland, a human resources manager, identify the documents in question, Ragland did not, and indeed could not, explain the inconsistency as she readily admitted she was not responsible for preparing the documents, and that Diane True had prepared both documents. The Respondent, however, did not bother to call True as a witness in this matter. Given these facts, I place no credence whatsoever on R. Exh. 5, and, if anything, am inclined to believe that Sombeck actually resigned his position and that R. Exh. 5 was tampered with after the fact to make it seem he had been discharged for the same reason as Landstrom.

[21] *Adam Metal Products Co.*, 282 NLRB 1163 (1987), cited by Respondent in it posthearing brief (p. 9), is factually distinguishable from the instant case and not controlling. In that case, unlike here, the employer had a specific rule prohibiting employee use of its phones for personal business without a supervisor's permission. The

The Respondent further argues that Landstrom was discharged for having made an inordinate amount of calls during the month of September. This argument, presented through Nabakowski's testimony, is, in my view, somewhat inconsistent with its claim that Landstrom was discharged for violating company rules prohibiting unauthorized use of its phones, for it suggests implicitly that had Landstrom's calls not been excessive, he would not have been discharged. Nabakowski's testimony would seem to confirm this. Thus, according to Nabakowski, Landstrom was discharged for making too many long-distance calls during the month of September. He testified that while reviewing Respondent's Exhibit 1 in mid-to-late October, the large number of calls placed to the same number in Weldon, Illinois, simply "jumped out" at him, causing him to search through employee personnel files to determine who the number belonged to. On learning that it was Landstrom's home phone, he discussed the matter with Millet and Reindl and a decision was reached on or about October 18 to discharge Landstrom. Nabakowski's testimony makes clear that if the calls to the Weldon location had been fewer in number, e.g., four or less, in all likelihood no action would have been taken against Landstrom.[22] Clearly, Respondent's suggestion that employee use of its phones to make personal long distance calls was strictly prohibited under an existing rule or policy would appear to be at odds with Nabakowski's tacit admission that such calls only became problematic for Respondent and could potentially lead to discipline when they were sufficient in number to catch his attention or when, as he put it, they "jumped out" at him during his monthly review of the phone bills. Thus, so long as employees did not draw attention to themselves by making too many consecutive long-distance calls, the Respondent would not investigate to determine who made the calls or whether they were personal or business in nature. Nabakowski's testimony makes it patently clear that regardless of any rule or policy Respondent may have had prohibiting employee use of its phones, personal long distance calls made by employees in contravention of any such policy were generally overlooked and, if Nabakowski is to be believed, investigated only when they were sufficient in number as to "jump out" at him. Given the inherent inconsistency in the reasons proffered by Respondent for discharging Landstrom, an inference is warranted that the stated reasons are not the true reasons for the discharge. Support for this finding is further found in the fact that while Nabakowski gave only Landstrom's excessive phone calls as the sole reason for the discharge, Millet, according to Landstrom's undisputed testimony, informed Landstrom that he had been discharged not just for making phone calls, but also because of his "attitude" and for complaining about not receiving retroactive pay and not getting his paycheck on time.[23] Millet, as noted, was not called to refute Landstrom's testimony. As the individual responsible for the decision, it was incumbent on the Respondent to call Millet as a witness to explain when the decision was made, and to explain what factors he relied on in discharging Landstrom. *Schaef Inc.*, 321 NLRB 202 (1996). Its failure to do so warrants an adverse inference that if called, Millet's testimony would not have supported the Respondent's position. *International Automated Machines*, 285 NLRB 1122 (1987). Where, as here, an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 199 (1995); *Dumbauld Corp.*, 298 NLRB 842, 848 (1990).

The Respondent argues that Landstrom's November 19 protected activity could not have played any role in the discharge because that decision was purportedly made on or about October 18, long before the Landstrom/Teichmann incident, and that it only delayed implementation of the decision until November 22 in order to obtain a replacement driver. In support of this argument, the Respondent relies on Nabakowski's testimony as to when the decision was made, and on documentary evidence purporting to show that in mid-to-late October, it had obtained an employment application from one Gilbert Karnes, Landstrom's alleged replacement, and that due to processing delays, Karnes was not able to start until November 21, which, according to Respondent, satisfactorily explains why Landstrom's actual discharge was put off until November 22. I find Respondent's claim that the actual decision was made in mid to late October unconvincing. For one, Respondent's argument in this regard is, as noted, premised almost exclusively on Nabakowski's testimony which, as found above, lacks credence. Aside from his poor demeanor, Nabakowski had a poor recollection of

alleged discriminatee in that case was found to have placed personal calls without prior approval from his supervisor. Here, the Respondent made no effort to ascertain whether Landstrom had been authorized to make such calls. Finally, unlike the instant case, the employer in *Adam Metal Products Co.* was found not have had knowledge of the alleged discriminatees' union activities prior to discharging him.

The Respondent further suggests that the absence of a specific rule restricting use of its phones should not preclude a finding that the discharge was lawful, citing *M. Burnstein & Co.*, 284 NLRB 718 (1987), for the proposition that a discharge for rules violations may be found even though there are no written work rules or procedures that an employer can point to in support of its actions. The Respondent's reliance on the *Burnstein* case is misplaced. In *Burnstein*, the employer maintained absolutely no work rules whatsoever prescribing particular penalties for particular misconduct, and did not claim that the discharge in that case resulted from a breach of any such rule. The judge in that case, with Board approval, found that the employer could therefore lawfully discharge the alleged discriminatee for cause. Here, the Respondent concedes that it has rules governing employee conduct, admits to having an employee handbook which presumably contains such rules, and has argued that Landstrom's discharge resulted from a breach of its rules prohibiting the use of its phones for personal long-distance calls. Given the position taken at the hearing and in its posthearing brief, its suggestion that the discharge should be deemed lawful under *Burnstein* notwithstanding the absence of particular rule governing such conduct is somewhat disingenuous and, in my view, totally without merit.

[22] Nabakowski initially testified that four such long-distance calls in any given month would cause him to investigate. He further stated, however, that even four calls might go unnoticed during his review of the phone bills, and that this would hinge on the size of the phone call, and the "location of the calls on the phone bill." Arguably then, if four or more calls to a same location were spread throughout the face of the phone bill creating no discernible pattern that would "jump out" at him during his review, the matter may go unnoticed and not be investigated by Nabakowski.

[23] The Board has found that terms like poor "attitude" are often mere euphemisms for those harboring union sympathies. *World Fashion*, 320 NLRB 922, 931–932 (1996).

events, and was inconsistent in explaining who was responsible for the discharge. Further Millet, who as found above, made the decision to discharge Landstrom, was not called to corroborate Nabakowski's claim as to when the decision was made. Nor was Teichmann, who did testify at the hearing and who, according to Nabakowski, was informed of the decision shortly after it was made, asked to corroborate the latter's assertion that the decision was made sometime on or about October 18. Respondent's argument as to the timing of the decision is further undermined by the fact that, assuming the decision was made on October 18, Landstrom was not informed of the decision until more than a month later, was never ordered to stop making such calls, and unbelievably was allowed to continue making "unauthorized" calls on an almost daily basis through the month of November, presumably until notified of his discharge on November 22 (see R. Exh. 2). If, as claimed by Nabakowski at the hearing, the excessive number of calls made by Landstrom during the month of September was costly to Respondent in terms of time and money wasted, and that this was the motivation behind the discharge, why did it allow Landstrom to continue making the "unauthorized" calls? Although Respondent suggests that it was waiting for Landstrom's replacement to arrive, this hardly explains why in the interim it did not simply instruct Landstrom to stop using the company phones to make personal long-distance calls. The obvious answer, in my view, is that the phone calls did not become a problem for Respondent until after it learned of Landstrom's November 19 protected activity, at which time it seized upon the "unauthorized" calls to justify getting rid of what it perceived to be a potential union agitator.

Respondent's contention that it had to wait for a replacement before letting Landstrom go is also lacking in merit. Assuming, arguendo, that the "hot parts" position was, as suggested by Respondent, a "critical" position, it was rendered so by virtue of the fact that the parts had to be delivered to Mitsubishi Motors in an expeditious and timely manner, and not because of any special skills or training required of a "hot parts" driver. The Respondent here does not contend that such "hot parts" deliveries could not have been performed by one of its other drivers, or that it had a shortage of drivers making it difficult to reassign Landstrom's duties to other employees while it awaited a replacement. Thus, if, as Respondent would have me believe, Landstrom's conduct was found in mid-October to be so egregious as to warrant his discharge, the Respondent's decision to retain him for 1 month thereafter makes no sense as the "hot parts" deliveries could have been made by one of Respondent's other drivers, or for that matter by using a contract driver as it had done before it hired Landstrom permanently on October 3. Further, Nabakowski's testimony regarding the hiring of Gilbert Karnes as Landstrom's replacement is confusing and not believable. He could not, for example, recall whether the "hot parts" position was advertised, stating only that he had been receiving "a lot of phone calls from owner/operators, people looking for employment," adding finally, "I can't remember how it came about." He claims that a day or so after October 18, he called Karnes to inform him of the "hot parts" position, and that while he took "a lot of applications" from individuals interested in Landstrom's job, all such applications were for "over-the-road" driving positions, and that Karnes was the only application he received for the "hot parts" position. Karnes' application, however, makes no mention that he was applying for a "hot parts" position. In fact, a notation in the upper left-hand corner of page 1 of Respondent's Exhibit 6 suggests that Respondent intended to hire Karnes only as a regular straight truckdriver in its warehouse facility, rather than as a "hot parts" driver in its "Flow Through" department.[24] If the notation was intended to have some other meaning, it was not revealed at the hearing. In this regard, it was incumbent on the Respondent, who produced the document from its own records, to explain what was meant by the notation. Thus, the weight of the evidence, in my view, does not support Respondent's claim that Karnes was hired as a replacement driver for Landstrom, or that it delayed implementing Landstrom's discharge until such time as Karnes was actually hired. Assuming, arguendo, that Karnes was in fact made a "hot parts" driver, I am convinced that Respondent simply placed him in that position sometime on or about November 21, after learning of Landstrom's November 19, protected conduct, and after deciding at or about the same time to discharge him for such activity.

Finally, and equally as important for purposes of showing the pretextual nature of the discharge, is the fact that Respondent made its decision to discharge Landstrom without so much as a prior warning. Nor did it bother to ascertain from Landstrom whether he was aware of its alleged prohibition on personal long-distance calls, or whether he had been authorized by his supervisor to make such calls. Respondent's rather hasty response, without so much as an investigation or warning, gives rise to an inference that the discharge was unlawfully motivated. *Uniroyal Goodrich*, 300 NLRB 426, 434 (1990).[25] Further, Landstrom, as noted, testified, without contradiction, that he had been making long-distance calls to his home since he first began working as a contract driver in early July, and that he had never been asked or warned not to do so. While the record does not reflect how many long-distance calls Landstrom made during July and August, it would not be unreasonable to believe that the number of calls made during those 2 months was somewhat comparable to those made by him during the subsequent months of September, October, and November. The Respondent does not dispute Landstrom's assertion that he had been making personal long-distance calls since before he became a full-time employee on October 3, and indeed admits in its posthearing brief that "[e]ven as a leased employee,

[24] The notation on the upper left hand corner of R. Exh. 1, p. 1 reads: "OK for warehouse Straight Truck Only" and contains the illegible initial of the individual making the comment.

[25] The Respondent claims that Nabakowski had no need to investigate if Landstrom had received permission to make the September long-distance calls, because as Landstrom's supervisor, Nabakowski, knew that he personally had not authorized such calls. The problem with Respondent's argument is that during the month of September, Landstrom was still a contract driver and was under Reindl's, not Nabakowski's, supervision. Nabakowski readily admits he did not become Landstrom's supervisor until October 3, when Landstrom was hired permanently by Respondent. Nabakowski further admits that prior to October 3, he was not involved in the daily functions of the contract drivers. Consequently, it is quite likely Reindl or some other management official might have authorized Landstrom to make his calls. Without investigating, Nabakowski or Millet, who was responsible for the discharge decision, clearly would not have known if such calls were authorized.

Landstrom never asked for permission to make the phone calls." Further, if Nabakowski's claim that he performed a monthly review of all company phone bills is accepted as true, then Respondent clearly would have known of the extent to which Landstrom was using company phones to make long-distance calls during his stint as a contract driver. However, despite its apparent knowledge of Landstrom's alleged "unauthorized" use of its phones, the Respondent never discussed the matter with him or directed him to stop making such calls, and made no effort to sever his relationship as a contract driver with the Company. Indeed, the Respondent, somewhat surprisingly, chose to hire him as a permanent driver at a higher salary because, according to Reindl, he had been "doing a great job" as a contract driver. Its willingness to hire Landstrom despite knowing that he had been making "unauthorized" long-distance calls further supports the view that Respondent had no policy restricting employee use of its phones, and that the employees' practice of making personal long-distance was of no great concern to Respondent. As the Respondent had condoned Landstrom's use of its phones prior to hiring him, I find it highly unlikely that it would have discharged him for such conduct so soon after hiring him. Further, as the only other activity of any consequence engaged in by Landstrom during his brief employment with Respondent was his wearing of the union jacket and possession and distribution of union bumper stickers on November 19, I find, particularly in light of Teichmann's comment that he would see to it that the Union did not come in, that it was this latter protected activity by Landstrom, and not the phone calls, which led to his discharge. Accordingly, the Respondent has failed to sustain its burden of showing that Landstrom would have been discharged even if he had not engaged in protected activity, warranting a finding that the discharge was in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, GATX Logistics, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By threatening David Landstrom with unspecified reprisal because he wore a jacket containing a union insignia to work, the Respondent has interfered with, restrained, and coerced Landstrom in the exercise of the rights guaranteed him by Section 7 of the Act, and has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By discharging Landstrom because it believed he was engaging in union activities, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding the discriminatory discharge of David Landstrom, I shall recommend that the Respondent offer him full reinstatement to his former position or to a substantially equivalent position dismissing, if necessary, any employee hired to replace him, without prejudice to the seniority or other rights and privileges previously enjoyed by Landstrom, and make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be required to expunge from its files any and all reference to Landstrom's discharge, and to notify him in writing that this has been done, and that this discriminatory action will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, GATX Logistics, Inc., Normal, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening David Landstrom or any other employee with unspecified reprisals because he wore a jacket to work containing union insignias.

(b) Discharging David Landstrom or any other employee for engaging in union or other protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Order, offer David Landstrom full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to David Landstrom's unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Normal, Illinois facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.